Supreme Court, U.S.
FILED
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No. 03 768

In the Supreme Court of the United States

HSIEN I. PENG,

Petitioner,

v.

MEI CHIN PENG HU; JONATHAN HU,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. In an Alleged Violation of an Unreasonable Arrest under the Fourth and Fourteenth Amendments of the United States Constitution Does a Plaintiff Have to Prove a Co-conspiracy Between State Officials and Private Individuals to Violate His or Her Civil Rights in Order to Establish a Right to Recover under 42 U.S.C. § 1983 Against a Private Defendant or Is it Sufficient If the Private Defendant Caused the Arrest by Providing False Statements to the State Officials and Obtained Overt and Significant Assistance of the State Officials in Effecting the Arrest?

LIST OF PARTIES TO THE PROCEEDINGS

The parties to the proceeding is Petitioner Hsien I. Peng and Respondents Mei Chin Peng Hu and Jonathan Hu.

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OPINIONS BELOW

The Order Granting Defendant Deputy Scott Gage's Motion for Summary Judgment by the United States District Court in Hsien I. Peng v. Mei Chin Peng Hu, et al.; Case No. CV 00-08871 GAF (Rzx) (C.D. Cal.) was entered on February 26, 2002 and is unreported (the "District Court Order for Summary Judgment") (App. D). The Order of Dismissal of Remaining Claims Following Response to Court's Order to Show Cause re: Subject Matter Jurisdiction by the United States District Court was entered on April 11, 2002 and is unreported (the "District Court Order re: Subject Matter Jurisdiction") (App. C) . The Opinion of the United States Court of Appeals for the Ninth Circuit affirming the District Court Order for Summary Judgment and the District Court Order re: Subject Matter Jurisdiction was entered on July 10, 2003 and was reported at 335 F.3d 970 (the "Ninth Circuit Opinion") (App. B). The Order of the United States Court of Appeals for the Ninth Circuit denying Plaintiffs' Petition for Rehearing and Petition for Rehearing En Banc was entered on August 27, 2003 and was unreported (the "Ninth Circuit Order") (App. A).

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 2003. The Order of the Court of Appeals denying the Petition the Petition for Rehearing En Bane was entered on August 27, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments of the United States Constitution is set forth below:

Section 1 of the Klu Klux Klan Act of 1871, Rev. Stat. 1979, as amended, 42 U.S.C. § 1983 provides:

> "Any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any state, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

The Fourth Amendment to the United States Constitution states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United states Constitution, Section 1 states in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. FACTS

Petitioner Hsien I. Peng ("Petitioner" or "Peng") petitions for review the entry of judgment by the United States Court of Appeals for the Ninth Circuit in favor of the Respondents Mei Chin Peng Hu and Jonathan Hu ("Mei Hu", "Jonathan Hu" or collectively "Respondents") .

This case arises under the Civil Rights Act, 42 U.S.C. § 1983, for a violation of Petitioner's Fourth Amendment right to be free from an unreasonable seizure of his person.

Petitioner was arrested for robbery by Los Angeles County Deputy Sheriff S. Gage ("Deputy Gage") based on allegations by his sister, Mei Hu, and her son, Jonathan Hu that petitioner forcibly took land title title documents from his sister.[1]

On the evening of May 2, 2000, a family meeting was held to resolve a dispute over land title documents that Mei Hu possessed, but that her father Chieh Tsai Peng ("Chieh Peng") asserted the right to possess. Petitioner was present at the meeting to mediate, and the meeting took place at the

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[1] The facts in this condensed version are essentially taken from the Ninth Circuit Opinion, and when necessary, supplemented by way of the District Court Order for Summary Judgment. (App. B and App. D).

house of Mei Hu. At the meeting Peng obtained the documents from Mei Hu. A factual dispute exists as to how he obtained the documents.

Petitioner asserts that Mei Ku gave him the documents, and when the dispute could not be resolved, Mei Hu demanded their return but petitioner refused. Mei Hu asserts that petitioner forcibly took land title title documents from her.

It is undisputed that after obtaining the documents, petitioner left the house and came back twenty minutes later and refused to return them to Mei Hu. Mei Hu then called her son Jonathan Hu to the house who then called the Sheriff's Department.

Deputy Gage responded to the call and while on the scene interviewed Mei Hu regarding the incident. Mei Hu only speaks Mandarin Chinese and Jonathan Hu translated for Deputy Gage.

Mei Hu, by way of Jonathan Hu's translation, told Deputy Gage that petitioner grabbed the documents from her and refusing to let go, becoming engaged in a tug of war with him over the documents, and that petitioner then raised his right fist as though he was going to strike her in the face at which point fearing for her safety, she released the documents. She further told Gage that once petitioner returned after taking the documents and leaving the house, petitioner refused to give the documents back to her.

After taking Mei Hu's statement, Gage then interviewed two witnesses who were present during the meeting. The identity and statements of those two witnesses are disputed. In his police report, Gage lists the two witnesses as two of

Peng's brothers. By contrast, Jonathan Hu asserts that the two interviewed were his grandfather, Chieh Peng, and his uncle Mr. Chi. It is undisputed, that neither person interviewed spoke English and that Gage once again had to rely on Jonathan Hu's translation to take their statements. According to Gage, the two witnesses interviewed stated that petitioner grabbed the documents from Mei Hu, but they could not recall whether he raised a fist at her. Jonathan Hu asserts that the two witnesses interviewed stated that petitioner raised a fist at Mei Hu and that he translated these statements to Gage. Chieh Peng has submitted a declaration that neither he nor Mr. Chi ever said that petitioner grabbed the documents or raised a fist. But as the district court noted, it is uncontroverted that Jonathan Hu told Gage that the witnesses saw petitioner grab the documents from Mei Hu. (App. B at 8a; App. D at 36a).

Deputy Gage has submitted a declaration in support of the District Court Order for Summary Judgment that when he arrived at the residence, he initially spoke to petitioner about the dispute between him and his sister. Gage claims that petitioner told him that he came to the location in order to discuss a dispute he had with his sister relating to land they owned in Taiwan, and that his sister called the police because she gave him title documents to copy and he had not returned them to her. (App. B at 17a; App. D at 34a, n. 1) . Petitioner however claims that Gage did not allow him to tell his side of the story. However, it is undisputed that petitioner contends that he did not forcibly take the documents from Mei Hu. (App. B at 17a; App. D at 34a n.1 and at 41a-42a) .

After interviewing Mei Hu and the two witnesses, Gage arrested petitioner for robbery. Gage's incident report states that Mei Hu "was adamant that the suspect be arrested," but Mei Hu and Jonathan Hu have both testified that they made no

such request. (App. B at 19a-20a; App. D at 35a n.2).

Charges were never brought by the Los Angeles County District Attorney's Office as it was determined that there was insufficient evidence to press charges. (App. B at 8a; App. D at 37a) .

Petitioner subsequently filed this suit pursuant to § 1983 in the United States District Court for the Central District of California against Gage, Mei Hu and Jonathan Hu alleging that Mei Hu and Jonathan Hu gave false statements to Gage which resulted in petitioner's arrest, and that Deputy Gage lacked probable cause for arrest, all in violation of the Fourth Amendment. (App. B at 8a) .

Gage moved for summary judgment, asserting that he is protected from suit by qualified immunity. The district court held a hearing and then granted Gage's motion for summary judgment. (App. B at 8a; App. D) .

Following Gage's dismissal from the action, the district court issued an order to show cause whether it had subject matter jurisdiction over the § 1983 claim against Mei Hu and Jonathan Hu. Following briefing by the parties, the court determined that it lacked subject matter jurisdiction because Mei Hu and Jonathan Hu were not state actors for purposes of the statute and further refused to exercise supplemental jurisdiction over the state law claim against the respondents for false arrest and false imprisonment. (App. B at 8a-9a; App. C).

The district court held that Mei Hu and Jonathan Hu were not state actors for purposes of § 1983 because there was no concerted action between them and Gage to have petitioner arrested and, in the alternative, Mei Hu and Jonathan Hu did

not have such control over Gage's conduct to be said to have proximately caused the alleged constitutional tort. (App. C at 26a-30a) .

Petitioner filed a timely appeal to the Ninth Circuit the District Court Order for Summary Judgment dismissing his claim against Gage and the District Court Order re: Subject Matter Jurisdiction dismissing his claim against Mei Hu and Jonathan Hu.

In a published opinion the Ninth Circuit affirmed both orders finding that Gage had probable cause to arrest petitioner, and even if he did not have probable cause, Gage was entitled to qualified immunity; and that even though there were disputed facts as to whether Mei Hu and Jonathan Hu had lied to Gage in causing his arrest, there was no evidence that Gage knew that petitioner was innocent of robbery to determine concerted action to make Mei Hu and Jonathan Hu state actors for purposes of § 1983. (App. B at 17a, 19a and 21a-22a).[2]

In coming to its conclusion that Mei Hu and Jonathan Hu were not state actors for purposes of § 1983, the Ninth Circuit panel principally relied on a footnote set forth in this Court's holding in Soldal v. Cook County, 506 U.S. 56, 60 n. 6, 113 S.Ct. 538, 121L.Ed2d 450 (1992), that if the police condone activities by private parties that they know to be illegal, there exists "sufficient evidence of conspiracy between the private

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[2] Aside from petitioner's denial that he forcibly took the title documents from Mei Hu and the declarations of his father Chieh Peng and Mr. Chi to the same effect, the Ninth Circuit panel specifically found that petitioner had cast doubt on the veracity of Jonathan Hu. (App. B at 19a).

parties and the officer to foreclose summary judgment" for the private parties. (App. B at 21a-22a) .

Subsequent to the issuance of the Ninth Circuit Opinion, petitioner requested a rehearing and requested a rehearing en banc, arguing among other things, that Soldal never announced any rule, let alone an exclusive one, as to how to determine when a private party may be deemed a state actor in the Fourth Amendment context; and that as a matter of substantive constitutional law this Court has never insisted that the "joint action" doctrine necessarily requires a co-conspiracy between the state defendants and private defendants to violate one's constitutional rights.

REASONS FOR GRANTING THE WRIT

A. This Court Has Never Directly Ruled in the Context of an Alleged Fourth Amendment Violation as to the Relationship Between the § 1983 Requirement of "Action under Color of State Law" and the Fourteenth Amendment Requirement of "State Action" to Establish a Right to Recover under 42 U.S.C. § 1983 Against a Private Defendant - the National Importance of the Issue and the Ninth Circuit's Fundamental Error in Characterizing this Court's Prior Case Law Strongly Supports Review.

Section 1983's "under color of state law" requirement and the Fourteenth Amendment's "state action" requirement are closely related. In fact, "until recently, th[e] Court did not distinguish between the two requirements at all." Lugar v. Edmonson Oil Co., 457 U.S. 922, 928, 102 S.Ct. 2744, 2749, 73 L.Ed.2d 482 (1982); United States v. Price, 383 U.S. 787, 794 n.7, 86 S.Ct. 1152, 1157 n.7, 16 L.Ed. 2d 267 (1966) ("In cases under § 1983, 'under color' of law has

consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."). Though describing the two requirements as "obviously related," Lugar, 457 U.S. at 928, 102 S.Ct. at 2749, this Court in Lugar declined to equate the two elements. The Court held that conduct which qualifies as "state action" under the Fourteenth Amendment also satisfies § 1983's under color of state law requirement. Lugar, 457 U.S. at 935, 102 S.Ct. at 2752.[3]

Thus, if the challenged conduct of the respondents constitutes state action as circumscribed by this Court's prior decisions, then their conduct is also action under color of state law and will support a suit against them under § 1983.

As a matter of substantive constitutional law the state action requirement and this Court's cases defining this requirement have only insisted that the conduct causing the deprivation of a federal right be fairly attributable to the State. Lugar, 457 U.S. at 937, 102 S.Ct. at 2753.

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[3] The Court in Lugar also observed that this conclusion is not inconsistent with the Court's prior precedent to the effect that "these two elements [state action and action under color of state law] denote two seperate areas of inquiry." Lugar, 457 U.S. at 935 n.18, 102 S.Ct. at 2752 n.18 (quoting Flagg Brothers Inc. v. Brooks, 436 U.S. 149, 155-156, 98 S.Ct. 1729, 1732-1733, 56 L.Ed.2d 185 (1978)). As the Court noted, although conduct satisfying the state action requirement of the Fourteenth Amendment satisfies the statutory requirement of action under color of state law, it does not follow from that that all conduct that satisfies the color of state law requirement would satisfy the state-action requirement of the Fourteenth Amendment. Id., 457 U.S. at 935 n.18, 102 S.Ct. at 2752 n.18.

This Court's case law reflects a two-part approach to the question of "fair attribution." First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. Lugar, 457 U.S. at 937, 102 S.Ct. at 2753-2754.

As this Court in Lugar pointed out, although these two principles are related, they are not the same. They collapse into each other when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions but diverge when the constitutional claim is directed against a private party without such apparent authority. Id., 457 U.S. at 937, 102 S.Ct. at 2754.

In the procedural due process garnishment and prejudgment attachment context, a private party who merely invokes a state statute or procedure in a private dispute, without "something more", cannot be converted from a private party to a state actor for purposes of liability under § 1983. Lugar, 457 U.S. at 937, 102 S.Ct. at 2754.

Lugar, citing to Flagg Brothers, stated that the "something more" is satisfied when the private party not only invokes mere process of the State, but receives significant aid by invoking the power of the State thru overt official involvement by a state official. Lugar, 457 U.S. at 926 and 939, 102 S.Ct. at 2748 and 2755); see also Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 487, 108 S.Ct. 1340, 1345, 99 L.Ed.2d 565 (1988) ("[W]hen private parties make use of state procedures with overt, significant assistance of state officials, state action may be found.").

As this Court in Pope held, the "joint action" test was satisfied because the involvement of the State was "so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment." Id., 485 U.S. at 487, 102 S.Ct. at 1346.

Nowhere in these line of cases has the Court suggested, let alone held, that the "overt, significant assistance of state officials" must be subject to a further co-conspiracy requirement between the State and the private parties to deprive one of one's property rights under the Fourteenth Amendment.

In the equal protection context, at least one case by this Court appears to have implicitly relied on the notion of "overt, significant assistance of state officials" to find state action by private parties without necessarily requiring a co-conspiracy requirement.

In Shelly v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), the significant factor was not a co-conspiracy between the State and private individuals to enforce racially restrictive covenants regarding the sale and purchase of real estate. As Shelly pointed out, the enforcement of the restrictive agreements by the state courts was not based on a co-conspiracy to discriminate between judicial actors and the private parties - rather the state courts enforced the agreements pursuant to the common law policy of the States as formulated by those courts in earlier decisions. Id., 334 U.S. at 19 n.22, 68 S.Ct. at 845 n.22.

What was significant in Shelly was the private party receiving significant substantial assistance by state officials in invoking the process of the State in enforcing the prohibitive agreements between the private parties. This satisfies the

"joint action" test requirement that the private party "be a willful participant in joint action with the State or its agents," (App. B, at 21a), without necessarily requiring a finding of a co-conspiracy.[4]

Furthermore, the Ninth Circuit Opinion's reliance on Soldal is misplaced and mischaracterizes this Court's holding in that case.

The writ of certiorari question presented to this Court in Soldal was limited to whether the seizure and removal of the Soldal's trailer by deputy sheriffs assisting the owner and manager of a trailer park implicated the Soldals' Fourth Amendment rights. Id., 506 U.S. at 62, 113 S.Ct. at 543. This Court did not consider, nor did it decide, the question of liability by the trailer park owner and manager under the "state action" doctrine arising in the context of a § 1983 suit. Rather, in dictum found in a footnote, this Court noted for the record that the circuit court found that because law enforcement officials prevented Soldal from using reasonable force to protect his home from private action that the officers knew were illegal, there was sufficient evidence of a co-

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[4] Of course, this Court has also held that a finding of a co-conspiracy between state officials and private parties may satisfy the "joint action" test. Cf. Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980); Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) (private party's joint participation with a state official in a conspiracy to discriminate would constitute state action under the Fourteenth Amendment and action under color of law for purposes of § 1983). But while sufficient, as the cases cited in the body of the petition indicate, it is not a necessary predicate in meeting the "joint action" test where there is "overt, significant assistance of state officials," in a dispute between private parties.

conspiracy and was not disturbed on appeal. Id., 506 U.S. at 62 n.6, 113 S.Ct. at 543 n.6.

However, these observations were not necessary to the holding nor resolution of the specific question presented. Nor did the Court discuss the broader issue presented in this case whether a co-conspiracy is a necessary predicate to a finding of joint action in the Fourth Amendment context. This Court's dictum in Soldal cannot support the broader proposition that the Ninth Circuit has now formulated in this case that private parties in a Fourth Amendment context can be found to be state actors for purposes of the "joint action" test only "if the police condone activities by private parties that they know to be illegal. . .". (App. B at 21a-22a).

This Court should clarify the relationship between the § 1983 requirement of action under color of state law and the Fourteenth Amendment requirement of state action to establish a right to recover under § 1983 against a private defendant in in the context of a Fourth Amendment violation.

This Court has observed that its previous formulations of different tests in different contexts is necessarily fact-bound. Cf. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.")

The plain language of § 1983 states the liability test as not only being satisfied by a person under color of state law who directly subjects one to a deprivation of his or her civil rights but, in the alternative, "causes [one] to be subjected" to a deprivation of his or her civil rights.

In the case at bar, the Ninth Circuit Opinion recognized that petitioner had raised significant factual issues as to the veracity of respondents' statements to Gage that formed the sole basis of Gage's determining probable cause to arrest petitioner. Gage's judgment in determining probable cause to arrest petitioner, even if objectively reasonable for purposes of qualified immunity on his part, was wholly dependent on and formed on the basis of Mei Hu's translated statements to him and the translation given to him by Jonathan Hu of statements made by the two witnesses.

Gage's judgment to arrest petitioner was intimately intertwined with respondents' actions and a factual dispute does exist as to whether the overt and significant state action in assisting respondents to arrest petitioner was caused by their false statements.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests a reversal of the Ninth Circuit judgment with a remand to be able proceed on their lawsuit.

Dated: November 20, 2003

Respectfully submitted,

LAW OFFICES OF
FRANK A. WEISER

Frank A. Weiser,
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Attorney for Petitioner
HSIEN I. PENG

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 02-55852
D.C. No. CV-00-8871-GAF(RZ)
Central District of California, Los Angeles
[Filed Aug. 27, 2003]

HSIEN I. PENG,
Plaintiff-Appellant,

v.

MEI CHIN PENG HU, JONATHAN HU;
S. GAGE, Los Angeles County Sheriffs Deputy,
Defendants-Appellees.

ORDER

Before: SCHROEDER, Chief Judge, GRABER, Circuit Judge, and Singleton, District Judge[1].

The panel has voted to deny appellant's petition for panel rehearing and Chief Judge Schroeder and Judge Graber vote

[1] The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

to reject the petition for rehearing en banc and Judge Singleton so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en bane. Fed. R. App. P. 35(b).

The petition for rehearing and petition for rehearing en banc are DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-55852
[Filed July 10, 2003]

This case is reported at 335 F.3d 970 (2003)

HSIEN I. PENG,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
MEI CHIN PENG HU;	)
JONATHAN HU;	)
S. GAGE, Los Angeles County	)
Deputy, Badge No. 406857,	)
sued individually,	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court
for the Central District of California
D.C. No. CV-00-08871-GAF
Gary A. Feess, District Judge, Presiding

JUDGES: Before: Mary M. Schroeder, Chief Judge, Susan P. Graber, Circuit Judge, and James K. Singleton, District Judge.*

OPINION

SINGLETON District Judge:

Hsien I. Peng appeals the district court's dismissal of his civil rights action brought pursuant to 42 U.S.C. § 1983.[1] Peng was arrested for robbery by Los Angeles County Deputy Scott Gage, based on allegations that Peng forcibly took land title documents from his sister, Mei Chin Peng Hu ("Mei Hu"). Peng was released when the district attorney's office determined that there was insufficient evidence to press charges. Peng claims that his Fourth Amendment right to be

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* The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

[1] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (West 2003).

free from an unlawful seizure was violated because Gage lacked probable cause to arrest him.[2] Peng alleges that his sister, Mei Hu, and her son, Jonathan Hu, also violated his Fourth Amendment right to be free of unlawful seizure because their allegedly false statements to Gage caused Peng's arrest. Thus, argues Peng, they were essentially state actors for the purposes of § 1983. Peng appeals the two district court orders that dismissed his claims. The first order granted Deputy Gage qualified immunity from suit. The second order held that the court did not have subject matter jurisdiction over the remaining claims against Mei Hu and Jonathan Hu because they were not state actors within the meaning of § 1983. The district court also declined to exercise supplemental jurisdiction over the state law claim against Mei Hu and Jonathan Hu alleging false arrest and imprisonment. Thus, the district court dismissed all of Peng's claims. We affirm.

I. STANDARD OF REVIEW

The order granting Gage qualified immunity was a summary judgment made pursuant to Federal Rule of Civil Procedure 56. The court dismissed the claims against Mei Hu and Jonathan Hu for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). A grant of summary judgment is reviewed *de novo*. *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002). Dismissal for lack of subject matter jurisdiction is also reviewed *de novo*. *McGraw v. United States*, 281 F.3d 997, 1001 (9th Cir.) *amended by* 298 F.3d 754 (9th Cir. 2002).

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[2] Peng also alleged an equal protection violation in his complaint, but he has not pursued this claim on appeal.

II. BACKGROUND

During the evening of May 2, 2000, Deputy Gage responded to a "family disturbance" dispatch. It appears that the disturbance arose out of a family meeting held to resolve a dispute over land title documents that Mei Hu possessed, but which her father, Chieh Tsai Peng ("C. Peng"), asserted the right to possess. Mei Hu's brother Peng was present at the meeting to mediate, and the meeting took place at the house of Mei Hu and Peng's sister. At some point, Peng obtained the documents from Mei Hu. Whether he used force to obtain them is disputed.

Peng asserts in his complaint that Mei Hu gave him the documents, and when the dispute could not be resolved, Mei Hu demanded their return but Peng refused.[3] It is undisputed that, after obtaining the documents, Peng left the house and came back twenty minutes later without the documents and refused to return them to Mei Hu. Mei Hu's son, Jonathan Hu, was called and told that his uncle Peng had become violent. Consequently, Jonathan Hu went to the house where the altercation had occurred and instructed his sister to call the police.

Deputy Gage responded to the call. While on the scene, Gage interviewed Mei Hu regarding the incident. Because Mei Hu only speaks Mandarin Chinese, Jonathan Hu translated for Gage. It is undisputed, as noted by the district

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[3] In his police report, Gage stated that Peng told him this version of the incident when he first arrived on the scene. Peng, however, disputes that he said this to Gage and instead contends that Gage never let him tell his side of the story.

court, that Mei Hu, via Jonathan Hu, told Gage the following:

- Mei Hu came to the location to meet Peng about a land dispute.

- Peng approached Mei Hu and asked if he could have the documents she possessed so he could photocopy them.

- When Mei Hu refused to hand Peng the documents, he reached out and grabbed the documents from Mei Hu's right hand and refused to let go, engaging in a tug of war with Mei Hu over the documents.

- Peng then raised his right fist as though he was going to strike Mei Hu in the face.

- Fearing for her safety, Mei Hu released the documents.

- After taking the documents from Mei Hu, Peng left the residence and returned approximately twenty minutes later.

- Once he returned, Peng refused to give the documents back to Mei Hu.

- Shortly thereafter, the police were called.

After taking Mei Hu's statement, Gage then interviewed two witnesses who were present during the altercation. The identity and statements of these two witnesses are disputed. In

his police report, Gage lists the witnesses as two of Peng's brothers. By contrast, Jonathan Hu asserts that the two interviewed were his grandfather, C. Peng, and his uncle, Mr. Chi. It is undisputed, however, that neither person interviewed spoke English and that Gage had to rely on Jonathan Hu's interpretation to take their statements. According to Gage, the two witnesses interviewed stated that Peng grabbed the documents from Mei Hu, but they could not recall whether he raised a fist at her. Jonathan Hu asserts that the two witnesses did see Peng raise a fist at Mei Hu and testified that he translated these statements to Gage. C. Peng has submitted a declaration that neither he nor Mr. Chi ever said that Peng grabbed the documents or raised a fist. But, as the district court noted, it is uncontroverted that Jonathan Hu told Gage that the witnesses saw Peng grab the documents from Mei Hu.

After interviewing Mei Hu and the two witnesses, Gage arrested Peng for robbery. Charges were never brought by the district attorney's office because it was determined that there was insufficient evidence. Peng subsequently brought this suit pursuant to § 1983 against Gage, Mei Hu, and Jonathan Hu. Gage moved for summary judgment, asserting that he is protected from suit by qualified immunity. The court held a hearing and then granted Gage's motion for summary judgment.

Following Gage's dismissal from the action, the district court issued an order to show cause whether it had subject matter jurisdiction over the § 1983 claim against Mei Hu and Jonathan Hu. Following briefing by the parties, the court determined that it lacked subject matter jurisdiction because Mei Hu and Jonathan Hu were not state actors. The court also

declined to exercise supplemental jurisdiction over the state law claim against the Hus alleging false arrest and false imprisonment, and the entire action was thus dismissed. *See* 28 U.S.C. § 1367(b) (providing that where federal claims are resolved without trial, a district court has discretion to dismiss supplemental state claims to permit their resolution in state court).

III. ANALYSIS

Peng contends that the district court erred when it dismissed his § 1983 claim against Gage, Mei Hu, and Jonathan Hu because there are disputed material facts precluding summary judgment and because the district court incorrectly applied the law. A review of the record establishes that, although there are several disputed facts, none of them is material to the dispositive legal issues. Thus, the district court did not err when it granted dismissal of Peng's claims.

A. Adequacy of the Notice of Appeal

As an initial matter, Gage asserts that the notice of appeal was untimely and insufficient. The order dismissing Gage was entered on February 27, 2002. The notice of appeal was filed on May 10, 2002. Attached to the notice of appeal is a copy of the final order dismissing the remaining claims against the Hus that was filed by the court on April 11, 2002. Gage argues that the notice was not timely because it was filed more than thirty days after the order dismissing him was entered, and it was insufficient because it did not include a copy of the order that dismissed him.

Regarding the timeliness argument, Gage is correct that a notice of appeal generally must be filed within thirty days of the judgment or order appealed from. Fed. R. App. P. 4(a)(1)(A) (stating that "the notice of appeal . . . must be filed with the district clerk within 30 days after the judgment or order appealed from is entered"). When multiple claims or parties are involved, however, judgment may be entered as to fewer than all the claims and all the parties "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b); *see also Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 923 (9th Cir. 2001).

In this case, a Rule 54(b) determination was not made following the order granting Gage summary judgment. Nor was a final judgment ever entered on a separate document; not even after the final order dismissing the remaining claims was entered. *See* Fed. R. Civ. P. 58(a)(1) (providing that "[e]very judgment . . . must be set forth on a separate document"); Fed. R. Civ. P. 79(a) (providing that "[a]ll . . . judgments shall be entered chronologically in the civil docket . . . [and] [t]he entry of an order or judgment shall show the date the entry is made"). Under these circumstances, judgment is considered entered 150 days from the entry of the final order dismissing the remaining claims. Fed. R. App. P. 4(a)(7)(A)(ii). Here, the notice of appeal is timely because the final order dismissing all remaining claims was entered on April 11, 2002, a final judgment was never entered, and the

notice of appeal was filed on May 10, 2003.[4] Gage's timing argument fails.

Likewise, Gage's argument regarding Peng's failure to attach the order granting Gage qualified immunity to the notice of appeal is unpersuasive. Federal Rule of Appellate Procedure 3 provides that "[a]n appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal." Fed. R. App. P. 3(a)(2). We conclude that dismissal of the appeal is not appropriate on this basis.

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[4] We further note that an appellant need not wait until the end of the 150-day time period to file a notice of appeal; it may be filed within 150 days of the final order without prejudice to the appeal. *See* Fed. R. App. P. 4(a)(7)(B) ("A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order."). Federal Rule of Civil Procedure 58 and Federal Rule of Appellate Procedure 4(a) were amended in 2002 to conform with the holding in *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387-88, 98 S. Ct. 1117, 55 L. Ed. 2d 357 (1978) (per curiam), which held that the separate-document requirement can be waived. *See* Fed. R. App. P. 4(a)(7) (2002 Amendments); Fed. R. Civ. P. 58 (2002 Amendments). The amendments further clarify that the decision to waive the entry of a separate document is for the appellant alone so that an appellee cannot object and require the appellant to go back to district court to get a final judgment entered. *Id.*

B. Qualified Immunity

Next, we address whether Gage was properly granted qualified immunity. The district court concluded that, "under the totality of the circumstances, Deputy Gage's belief that probable cause existed to arrest Peng for robbery was objectively reasonable." The court reasoned that Mei Hu provided sufficient detail regarding the incident to support a reasonable belief that Peng had used a threat of force to obtain the documents. The court was further convinced that probable cause existed because of the corroboration Gage received from the two witnesses he interviewed, who stated that Peng grabbed the documents from Mei Hu against her will.

A finding of qualified immunity depends on a two-part inquiry by the court. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). First, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* Second, "if a violation could be made out on a favorable view of the parties' submissions, the next sequential step is to ask whether the right was clearly established." *Id.* However, if the allegations taken as true do not establish a violation, "there is no necessity for further inquiries." *Id.* The United States Supreme Court has noted that "[t]he qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam) (citation omitted).

Peng alleges that Gage violated his Fourth Amendment right to be free of an unlawful seizure because Gage arrested

him without probable cause. Gage arrested Peng for robbery. In California, where the arrest occurred, "robbery" is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Cal. Penal Code § 211 (West 2003). A police officer may make a warrantless arrest when the "officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed." *Id.* § 836(a)(3) (West 2003).

Under California law, an officer has probable cause for a warrantless arrest "if the facts known to him would lead a [person] of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime." *People v. Adams*, 175 Cal. App. 3d 855, 221 Cal.Rptr. 298, 301 (Cal. Ct. App. 1985) (citation and quotations omitted); *see also People v. Lewis*, 109 Cal. App. 3d 599, 167 Cal.Rptr. 326, 330 (Cal. Ct. App. 1980). This is very similar to the Fourth Amendment test applied by this court, which provides that "probable cause exists when, under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the suspect] had committed a crime." *United States v. Buckner*, 179 F.3d 834, 837 (9th Cir. 1999) (citations and quotations omitted).

Peng advances the following five arguments on appeal attacking application of qualified immunity to Gage. First, Peng argues that a civil dispute over ownership of land title documents cannot form the basis for probable cause. *See, e.g., Stevens v. Rose*, 298 F.3d 880, 884 (9th Cir. 2002) (holding that an arrest to retrieve car keys where ownership

of the car was in dispute was not supported by probable cause); *Allen v. City of Portland*, 73 F.3d 232, 237 (9th Cir. 1995) (holding that a dispute regarding payment of a restaurant bill does not give rise to probable cause to arrest); *Kennedy v. L.A. Police Dep't*, 901 F.2d 702, 706 (9th Cir. 1990) (holding that possessing property of another for the purpose of security on a debt does not give rise to probable cause to arrest). Second, Peng asserts that there is a material factual dispute regarding whether he used force to obtain the documents so that summary judgment is precluded. Third, Peng asserts that probable cause did not exist because an officer is not allowed to rely solely on the allegations of a victim of a crime without making an independent investigation of the allegations. *See, e.g., Arpin*, 261 F.3d at 925 ("In establishing probable cause, officers may not solely rely on the claim of a citizen witness that he was a victim of a crime, but must independently investigate the basis of the witness' knowledge or interview other witnesses."). Fourth, Peng challenges Gage's veracity and accuses him of fabricating evidence. Fifth, and finally, Peng argues that the question whether probable cause existed at the time of Peng's arrest is for a jury, and not the court, to decide. Given the totality of the circumstances facing Gage at the moment of the arrest, we find these arguments unpersuasive.

Addressing Peng's first contention, we disagree that the allegations underlying Peng's arrest were civil in nature. Peng correctly notes that this court has been very suspicious of efforts to involve the police and the power of arrest in collecting debts and enforcing purely civil obligations. Such

actions take on the appearance of extortion.[5] The reasonable effort to prevent the use of the police to collect disputed debts should not, however, cause us to inhibit the police in preventing violence.

It is important to recognize that the dispatch in this case was for a domestic dispute. As the California Court of Appeals recognized in *People v. Higgins*, 26 Cal. App. 4th 247, 31 Cal.Rptr.2d 516, 518 (Cal. Ct. App. 1994), domestic disputes present a responding officer with situations involving great potential danger to occupants of the household. *Id.* at 518. If the officer hesitates to act, his hesitancy may lead to the occurrence of otherwise preventable violence. *Id.* at 518-19. The *Higgins* court agreed with the decision by the Washington State Court of Appeals in *State v. Raines*, 55 Wn. App. 459, 778 P.2d 538 (Wash. Ct. App. 1989), when it noted that police officers responding to a domestic violence report have a duty to ensure the present and continued safety and well-being of the occupants of the residence where the alleged violence took place. *Higgins*, 31 Cal.Rptr.2d at 519 (quoting *Raines*, 778 P.2d at 542-43). These cases are distinguishable from most of the extortion cases, in which there is not a realistic risk of violence.

For example, in *Stevens*, 298 F.3d at 882, cited by Peng, a district attorney was trying to mediate a dispute over ownership of a car between Stevens and his wife. Stevens

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[5] Extortion at common law was the use of official position or authority to command under color of office a fee or benefit to which the person making the demand was not entitled. *See* Rollin M. Perkins & Ronald N. Boyce, Criminal Law 442-48 (3d ed. 1982).

grabbed the title to the car from the DA and tried to eat it. The DA grabbed the title back and Stevens left after being ordered to do so. *Id.* When the DA realized that Stevens may have had the keys to the car, an officer was sent after him to retrieve them. When Stevens refused to stop and talk, the officer arrested him. This court held that there was not probable cause to arrest because it was solely a civil matter. *Id.* at 883-84. It was never alleged in *Stevens* that there was a risk of violence or that violence had occurred.

Having carefully considered the record, we are satisfied that this case is nearer to a case of alleged domestic violence than it is to the extortion cases upon which Peng relies. It is true that Peng and Mei Hu are sister and brother and not domestic partners, and that neither lived in the home where the dispute took place. The undisputed evidence, however, establishes that the family members were upset and angry, and given the language barriers between Gage and the witnesses, we are satisfied that Gage had probable cause to arrest Peng. As the Supreme Court of California has noted in a related context: "'the business of policemen and firemen is *to act*, not to speculate or meditate on whether the report [of recent crime] is correct. People could well die in emergencies if the police tried to act with the calm deliberation associated with the judicial process.'" *Tamborino v. Superior Court*, 41 Cal. 3d 919, 719 P.2d 242, 245 n.2, 226 Cal. Rptr. 868 (Cal. 1986) (quoting *Wayne v. United States*, 115 U.S. App. D.C. 234, 318 F.2d 205, 212 (D.C. Cir. 1963) (Burger, J. concurring)).

Peng's second argument is that, because factual disputes exist, summary judgment was inappropriate on the issue of qualified immunity. There are several factual disputes,

including whether a threat of force was in fact used by Peng to obtain the documents from Mei Hu. This dispute is not, however, material to what Gage knew at the time of arrest. "Fourth Amendment issues [ ] are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred." *Saucier*, 533 U.S. at 207. At the time of the arrest, Gage had interviewed Mei Hu via Jonathan Hu, who was acting as interpreter. At that time, Mei Hu gave a detailed account of the incident, which -- so far as Gage knew -- was corroborated, since he relied on Jonathan Hu's translation of the two witnesses' testimony.

Another factual dispute exists because Gage has stated that he spoke to Peng when he first arrived at the scene and was told by Peng that Mei Hu willingly gave him the documents. This contradicts Mei Hu's allegations that Peng obtained the documents by threat of force; specifically, by raising a fist at her.[6] Nevertheless, an officer who is investigating a domestic dispute must make snap decisions regarding whether there is probable cause to arrest. Where, as here, the victim alleges that force, or a threat of force, existed, it is important for officers to err on the side of safety for the victim in order to prevent further violence and allow the parties to cool down.

Third, Peng asserts that Gage did not have probable cause at the time of arrest because he relied solely on Mei Hu's allegations. This court has said that "officers may not solely rely on the claim of a citizen witness that he was a victim of

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[6] Because Peng contends that he did not make this statement to Gage, taking this assertion as true -- because Peng is the nonmoving party -- Mei Hu's allegations at the time of the arrest are uncontroverted.

a crime, but must independently investigate the basis of the witness' knowledge or interview other witnesses." *Arpin*, 261 F.3d at 925 (citing *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1444 (9th Cir. 1991)). A sufficient basis of knowledge is established if the victim provides "'facts sufficiently detailed to cause a reasonable person to believe a crime had been committed and the named suspect was the perpetrator.'" *Fuller*, 950 F.2d at 1444 (quoting *People v. Ramey*, 16 Cal. 3d 263, 545 P.2d 1333, 1336, 127 Cal. Rptr. 629 (Cal. 1976)). Here, Mei Hu provided sufficiently detailed facts regarding the incident to support a finding that probable cause to arrest existed.

Nevertheless, after interviewing Mei Hu, Gage also interviewed two more witnesses who were present during the altercation, again with the help of Jonathan Hu as an interpreter. The identity of these two witnesses is disputed, as is what they actually told Gage. In his report, Gage states that the witnesses are Peng's brothers. By contrast, Jonathan Hu stated in his deposition that the witnesses were his grandfather, C. Peng, and his uncle, Mr. Chi. It is undisputed, however, that the two people interviewed by Gage did not speak English.

Regarding what was said by the witnesses, Jonathan Hu, acting as interpreter, told Gage that the witnesses corroborated the raised-fist allegation, as well as the grabbing of the documents. In his report, Gage stated only that the witnesses could not recall whether or not Peng raised his fist, but that they saw Peng grab the documents from Mei Hu. Peng has submitted a declaration by C. Peng that neither he nor Mr. Chi ever told anyone anything about what happened. As the district court noted, Peng has not cast doubt on the fact

that, prior to Peng's arrest, Jonathan Hu, acting as interpreter, told Gage that the two witnesses saw Peng grab the documents from Mei Hu. Peng has cast doubt on the identity of the witnesses and the veracity of Jonathan Hu, but Gage could not have known this at the time of the arrest.[7] We are satisfied that Gage made a reasonable investigation under the circumstances before he arrested Peng. *See Fuller*, 950 F.2d at 1442-44 (holding that "police officers ha[ve] a duty to conduct an investigation into the basis of the witness' report"). We conclude that the presence of a factual dispute regarding a victim's complaint at the scene of an alleged domestic disturbance does not defeat probable cause if: 1) the victim's statements are sufficiently definite to establish that a crime has been committed; and 2) the victim's complaint is corroborated by either the surrounding circumstances or other witnesses.

Fourth, Peng attacks Gage's veracity. Peng notes inconsistencies in the sequence of events provided by Gage's testimony and police report, and Peng's recollection of events. None of these inconsistencies, however, is material to a finding of probable cause. Peng notes that Gage says he interviewed Peng when he first arrived on the scene, but Peng contends that he did not. Peng also asserts that Gage has inconsistently testified that Peng told him the documents were at a friend's house before he was arrested, while in his declaration Gage asserts that Peng told him this after he was arrested, while he was being placed in the patrol car. Another inconsistency, asserts Peng, is that Gage's incident report

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[7] It is not clear from the record exactly how many family members and friends were present at the place where the altercation occurred, or their identities.

states that the victim was adamant that Peng be arrested, and yet Mei Hu and Jonathan Hu have testified that they made no such request. These are, however, inconsistencies in incidental facts and are to be expected where different people are called upon to remember startling events. They are not material and they do not establish that Gage fabricated evidence, as Peng has asserted.

Peng's final argument is that, if there is more than one reasonable inference from the undisputed facts regarding the existence of probable cause, it is a question for the jury and not the court. Peng cites *Kennedy v. Los Angeles Police Department*, 901 F.2d 702 (9th Cir. 1990), for support of this proposition. On this point, *Kennedy* was called into question by *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993), which held that after *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991),

> whether a reasonable officer could have believed probable cause . . . existed to justify a search or an arrest is "an essentially legal question" that should be determined by the district court at the earliest possible point in the litigation.

(Citation omitted). Thus, where the material, historical facts are not in dispute, and the only disputes involve what inferences properly may be drawn from those historical facts, it is appropriate for this court to decide whether probable cause existed at the time Gage arrested Peng. Because probable cause existed, there is no violation of Peng's Fourth Amendment right, and no further inquiry is necessary.

If we had doubts about probable cause, we would still reach the same conclusion because, as this court said in *Fuller*, "[e]ven absent probable cause, qualified immunity is available if a reasonable police officer could have believed that his or her conduct was lawful, in light of the clearly established law and the information the searching officers possessed." *Fuller*, 950 F.2d at 1443 (citing *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). If Gage was mistaken about the existence of probable cause to arrest Peng, his mistake was objectively reasonable, and he was entitled to qualified immunity.

C. Subject Matter Jurisdiction

Peng's second claim on appeal challenges the dismissal of the claims against Mei Hu and Jonathan Hu for lack of subject matter jurisdiction. The court held that Mei Hu and Jonathan Hu were not state actors for purposes of § 1983 because there was no concerted action between them and Gage to have Peng arrested. Although generally inapplicable to private parties, a § 1983 claim can lie against a private party when, as relevant here, "'he is a willful participant in joint action with the State or its agents.'" *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) (quoting *Dennis v. Sparks*, 449 U.S. 24, 27, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980)).

In the case at hand, the alleged violation of Peng's rights was his arrest, which was done by Gage in his capacity as a police officer. Clearly, the arrest was a state action. Thus, if Mei Hu and Jonathan Hu are liable pursuant to § 1983, it must be because they acted jointly with Gage. As the United States Supreme Court noted in *Soldal v. Cook County*, 506 U.S. 56, 60 n.6, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992),

if the police condone activities by private parties that they know to be illegal, there exists "sufficient evidence of conspiracy between the private parties and the officer to foreclose summary judgment" for the private parties. In *Soldal*, the police refused to allow the owner of a mobile home to oppose an eviction by the owner of the park where the home was located, even though the police knew the eviction was illegal. The mobile home owner brought a § 1983 action against the park owner and police. The park owner was held by the circuit court to be a state actor based on his conspiracy with the police to illegally evict the mobile home owner. *Id.* at 58-9. This holding was not disturbed on appeal to the Supreme Court. *Id.* at 60 n.6.

Here, there is no evidence that Gage knew that Peng was innocent of robbery. The trial court correctly concluded that a finding of concerted action could not be found on this record. *See Howerton v. Gabica*, 708 F.2d 380, 385 (9th Cir. 1983) (holding that a single request that the police perform their peace-keeping responsibilities may be insufficient to create a joint undertaking); *accord King v. Massarweh*, 782 F.2d 825, 828-29 (9th Cir. 1986). This court in *Howerton* noted, and in *King* held, that a single request to the police, without more, was not sufficient to establish a claim against a private actor pursuant to § 1983. *See Howerton*, 708 F.2d at 385; *King*, 782 F.2d at 829. Accordingly, the § 1983 claim against Mei Hu and Jonathan Hu was properly dismissed.

IV. CONCLUSION

For the foregoing reasons, the decision of the district court granting Gage qualified immunity and the district court's decision to dismiss the claims against Mei Hu and

Jonathan Hu for lack of subject matter jurisdiction are affirmed.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV-00-08871 GAF (Rzx)

[Filed Apr. 11, 2002]

HSIEN I. PENG,
Plaintiff,

v.

MEI CHIN PENG HU; JONATHAN HU; LOS ANGELES COUNTY DEPUTY SCOTT GAGE, Badge No.: 406857, sued individually; DOES 1 THROUGH 10, inclusive,
Defendants.

DISMISSAL OF REMAINING CLAIMS FOLLOWING RESPONSE TO COURT'S ORDER TO SHOW CAUSE

I.

BACKGROUND

This action arose after Los Angeles County Sheriff Deputy Gage arrested Plaintiff Peng for robbery. Plaintiff claimed that Deputy Gage violated his Fourth Amendment right to be

free from unreasonable searches and seizures by arresting him without probable cause. This Court granted Deputy Gage's motion for summary judgment on the ground that he reasonably believed Peng's arrest was supported by probable cause, a determination based on the totality of the circumstances known to him at the time of the arrest. The uncontradicted evidence presented in connection with that motion established that the alleged victim of Peng's purported robbery told Deputy Gage, through an interpreter, that Peng had secured real estate title documents from her by threats of force. However, granting that motion did not end this case. Two defendants remain: the complaining witness and her son who interpreted for Deputy Gage at the time of Peng's arrest.

Because no state actors remain in the case, the Court issued an Order to Show Cause regarding its jurisdiction to hear the case against the individual defendants. In the Court's view, the issue is whether the case now arises under federal law, since Section 1983 permits actions only against those who, under color of law, deprive a person of rights secured by the Constitution or laws of the United States.

Both parties responded, and both claim that the issue before the Court is not one of jurisdiction but "causation." Plaintiff asserts:

> [I]n researching a response to this Court's present OSC, it appears that the issue is not a question of subject matter jurisdiction under the "state action" doctrine but a factual question of whether the Hu Defendants proximately caused the Plaintiff's injuries.

Plaintiff's Response, at 2. Plaintiff cites King v. Massareweh,

782 F.2d 825, 828 (9th Cir. 1986) in support of that proposition, and argues that the fact question must be presented to a jury. Defendants seem to agree with the principle, but argue that the deputy's independent determination of probable cause cuts off the alleged causal connection between the defendants' conduct and the alleged violation.

Because those facts demonstrate that there was no concerted action between the officer, the complaining witness and the interpreter, the section 1983 case as against the individual defendants should be DISMISSED because the individual defendants were not state actors and, under controlling case law, cannot be said to have caused a deprivation of a federal constitutional right. The remaining claim is DISMISSED under 28 U.S.C. § 1367 (c)(3).

II.

DISCUSSION

Where a private entity or person becomes so closely involved with state and local governments that they can be said to be a state actor, they are subject to liability under Section 1983 for conduct that violates an individual's civil rights. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). Under such circumstances, the private actor's conduct constitutes "state action" which the Supreme Court equates with the "under color of state law" requirement of the statute. Id. at 935. Nevertheless, while recognizing that private entities can conduct themselves in such a way as to bring themselves within the scope of Section 1983, the Supreme court noted:

As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that "most rights secured by the Constitution are protected only against infringement by governments," Flagg Brothers, 436 U.S. at 156, 98 S.Ct. at 1733. As the Court said in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 49, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974):

"In 1883, this Court in the Civil Rights Cases, 109 U.S. 3 [3 S.Ct. 18, 27 LEd, 835], affirmed the essential dichotomy set forth in [the Fourteenth] Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield."

...

Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of "fair attribution." First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person, for whom the Slate is responsible. ... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

457 U.S. at 936.

Calling the police, seeking their assistance, or reporting a crime does not constitute the type of conduct that will subject a private party to litigation as a state actor. For example, in Benavidez v. Gunnell, 722 F.2d 615, 618 (10th Cir. 1983), private parties called police regarding alleged criminal conduct was insufficient to constitute "joint action" with police to render the private citizens potentially liable under Section 1983. Rather, the private parties must have such a close relationship with the police that their actions can be considered "joint." As the Ninth Circuit has noted, when a party "through their ongoing relationship with the police officer who was also a tenant of theirs, 'cloaked themselves with the authority of the state in effecting repossession of the trailer premises,'" the private party's joint conduct with the officer constituted state action. Massareweh, 782 F.2d., at 828, quoting Howerton v. Gabica, 708 F.2d 380, 385 (9th Cir. 1983). Thus, in Howerton, even though the conduct that caused the alleged injury was undertaken by private parties, the presence and ongoing participation of a police officer in the surrounding events was enough to give rise to a claim that the defendants conduct constituted "state action."

Even plaintiff concedes that he cannot show the defendants to be state actors under the "joint actor" doctrine of Howerton. Instead, Plaintiff seeks to circumvent Howerton and cases like it by re-casting the question as one of "causation." His principle authority for this proposition is Massareweh where the alleged injurious conduct was undertaken by police officers who were called to the scene by plaintiff's landlord. In that case, the Court stated that, where the actual wrongful conduct is undertaken by state actors, the question is whether the private party can be said to have "caused" the injury to occur for purposes of determining their

potential liability under Section 1983. But the Court again reiterated that merely calling the Police to the scene of a dispute does not constitute such "causation." The Ninth Circuit wrote:

> Under similar circumstances, this court has determined that, absent some showing that a private party had some control over state officials' decision to arrest a person or search his residence, the private party did not proximately cause the injuries stemming from the arrest and search. Arnold v. International Business Machines, 637 F.2d at 1356. In Arnold, the Plaintiff sought Section 1983 damages against IBM for its involvement in a state investigation that led to a search of his residence, his arrest, and indictment. IBM had supplied information to state authorities concerning possible criminal activity related to leaks of trade secrets. In addition, IBM provided the State task force with money for expenses incurred in the course of the investigation and supplied witnesses to testify before the grand jury. This court determined that although the state action would not have occurred "but for" IBM's involvement, ***absent some showing that IBM had control over the task force in its decision to search the plaintiff's residence, arrest, or indict him, IBM did not proximately cause Arnold's injuries.***

782.F.2d, at 828-29. (Emphasis added.). Accord, Doe v. Unocal, 110 F.Supp.2d 1294, 1307 (C.D. Cal. 2000). Thus, unless a private party has control over the conduct of the state actor, a state actor's conduct that allegedly caused a

constitutional violation does not provide a basis for pursuing a Section 1983 claim against the private party.

Here the conduct of the defendants fell far short of the conduct of IBM, which the Court found did not constitute "control" over police actions under Section 1983. Since the undisputed facts here indicate that Deputy Gage independently determined to arrest plaintiff, and that the defendants had no control over that decision, plaintiff's argument that the issue is one of "causation" fails to support his contention that the present action may proceed to trial.

III.

CONCLUSION

Having considered the undisputed facts that have been established in prior motions for summary judgment, and having considered the memoranda of the parties submitted in response to the Court's order to show cause, the Court concludes that the Section 1983 claim against the defendants should be DISMISSED. Further, since the only remaining claim arises under state law, the court declines to exercise supplemental jurisdiction over that claim under 28 U.S.C. § 1367(c)(3), and orders that claim **DISMISSED**.

IT IS SO ORDERED.

DATED: April 11, 2002

/s/
Judge Gary Allen Fees
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV-00-08871 GAF (Rzx)

[Filed Feb. 26, 2002]

HSIEN I. PENG, Plaintiff,	)
v.	)
MEI CHIN PENG HU; JONATHAN HU; LOS ANGELES COUNTY DEPUTY SCOTT GAGE, Badge No.: 406857, sued individually; DOES 1 through 10, inclusive, Defendants.	)

ORDER GRANTING DEFENDANT DEPUTY SCOTT GAGE'S MOTION FOR SUMMARY JUDGMENT

I.

INTRODUCTION

This action arose after Los Angeles County Sheriff Deputy Gage arrested Plaintiff Peng for robbery. Plaintiff alleges Deputy Gage violated his Fourth Amendment right to be free

from unreasonable searches and seizures by arresting him without probable cause. Deputy Gage now moves for summary judgment, claiming he reasonably believed Peng's arrest was supported by probable cause, a determination based on the totality of the circumstances known to him at the time of the arrest.

The uncontradicted evidence presented in connection with this motion establishes that the alleged victim of Peng's purported robbery told Deputy Gage, through an interpreter, that Peng had secured real estate title documents from her by threats of force. Moreover, the interpreter, translating for two third-party witnesses, advised Deputy Gage that they corroborated the victim's statement that Peng grabbed the documents from her hands and out of her purse in the same manner that she had described. In deposition testimony, the interpreter corroborated Deputy Gage's testimony on this point in every material detail.

Although other witnesses now contradict certain statements that Gage claims they made at the time, a number of their statements address facts that are not material to the Court's determination. As to the remainder of their statements, even if the Court were to credit the plaintiff's version of the facts on those points, the uncontroverted facts regarding statements made by the victim and the witnesses through the interpreter establish, as a matter of law, that Deputy Gage was presented with sufficient information that would have warranted a reasonable police officer to conclude that be had probable cause to arrest the plaintiff. Therefore, the Court **GRANTS** Defendant's Motion for Summary Judgment.

II.

FACTUAL BAC KG ROUND

Unless otherwise indicated, the following facts are not in dispute or deemed by this Court to be without substantial controversy within the meaning of Rule 56, Federal Rules of Civil Procedure.

A. THE FAMILY GATHERING.

On May 2, 2000, Plaintiff Hsien I. Peng ("Plaintiff" or "Peng") met with his sister, Defendant Mei Chin Peng Hu ("M. Hu"), at another sister's house in Cerritos. (Compl. ¶¶ 8, 10; SUF ¶ 4). Others attending the meeting included Peng and M. Hu's father, Chieh Tsai Peng ("C. Peng"), and two of Peng's brothers-in-law. (Compl. ¶ 11). The purpose of this meeting was to resolve a dispute between C. Peng and M. Hu involving the ownership of a piece of real property in Taiwan. (Id. ¶ 12).

During the meeting, Plaintiff obtained the title documents of the Taiwan property from M. Hu. A dispute exists as to how Plaintiff obtained these documents. M. Hu claims that Plaintiff grabbed the documents out of her hand and purse, and threatened her by raising his first. (M. Hu Depo. at 47:6-18). Plaintiff, however, denies these allegations and states that M. Hu handed him the documents pursuant to her father's request to do so. (Pang Decl. ¶¶4, 5; Compl. ¶ 15).

B. THE FAMILY DISTURBANCE CALL AND PENG'S ARREST

Sometime after Peng obtained the title documents from M. Hu, the Los Angeles County Sheriff's Department was called and at approximately 8:00 p.m., Deputy Gage was dispatched to the Cerritos residence. (SUF ¶¶ 3, 4). Upon arriving at the residence, Deputy Gage contacted M. Hu, the alleged victim of the family disturbance, and discovered that she only spoke Mandarin Chinese.[1] (Id. ¶ 8). In order to communicate with M. Hu, Deputy Gage utilized M. Hu's son, Jonathan Hu ("J. Hu"), as a translator. (Id.) Through the translator, M. Hu told Deputy Gage the following information:

- M. Hu came to the location to meet Peng about a land dispute. (Id. ¶ 10).

- Peng approached M. Hu and asked if he could have the documents she possessed so he could

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[1] Deputy Gage states that he arrived at the residence and then initially spoke with Peng about the dispute between him and his sister. (Gage Decl. ¶ 5). Deputy Gage claims that Peng told him that he came to the location in order to discuss a dispute he had with his sister relating to land they owned in Taiwan, and that his sister called the police because she gave him title documents to copy and he had not returned them to her. (Id. ¶ 6). Peng, however, claims that Deputy Gage spoke to his sister for a minute before he came over to talk to him. (Peng Depo. at 54). Peng further claims that Deputy Gage asked him if he took anything from his Sister, and Peng told him that he did not. (Id.) According to Peng, the only thing he told Deputy Gage was that "this is a family matter," and Deputy Gage handcuffed him without giving him an opportunity to explain his side of the story. (Id. at 55).

photocopy them. (Id. ¶ 11).

- When M. Hu refused to hand Peng the documents, he reached out and grabbed the documents from M. Hu's right hand and refused to let go. (Id. ¶ 12, 14).

- Peng then raised his right fist as though he was going to punch M. Hu in the face. (Id. ¶ 15).

- Fearing for her safety, M. Hu released the documents. (Id. ¶ 16).

- After taking the documents from M. Hu, Peng left the residence and returned approximately twenty minutes later. (Id. ¶ 17).

- Once he returned, Peng refused to give the documents back to M. Hu. (Id. ¶ 18).

- Shortly thereafter, the police were called.[2] (Id. ¶ 19).

After speaking with M. Hu, Deputy Gage contacted two witnesses who only spoke Mandarin Chinese, and again, with

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[2] In addition to these statements, Deputy Gage indicated in his police report that M. Hu was "adamant that the suspect be arrested." (Kemalyan Decl. at Ex. B). M. Hu and J. Hu deny that M. Hu ever asked Deputy Gage to arrest Peng. (M. Hu Depo. at 46-47; J. Hu Depo. at 51). The Court views this dispute as immaterial to the issue of whether Deputy Gage had probable cause to arrest Peng.

the help of J. Hu as a translator, he verified that Peng grabbed the documents out of M. Hu's hand and purse when she refused to hand them over; however, neither witness could recall whether Peng raised his fist at M. Hu. (Gage Decl. ¶ 11).[3] Although Deputy Gage's police report identifies the two witnesses as Peng's brothers, J. Hu identifies them as his grandfather, C. Peng, and his uncle, Mr. Chi. (Compare Kemalyan Decl. at Ex. B, p. 25 with J. Hu Depo. at 33-34). C. Peng, however, submitted a declaration stating that neither he nor Mr. Chi ever told anyone that evening, including J. Hu and Deputy Gage, that Peng grabbed documents out of M. Hu's hand and purse, or that Peng threatened M. Hu by raising his fist.[4] (C. Peng Decl. ¶¶ 8-9). However, no one has contradicted J. Hu's testimony that, in his capacity as translator, he advised Deputy Gage that these two witnesses corroborated M. Hu's description of the events of the evening in question.

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[3] J. Hu also testified that the two witnesses specifically told Deputy Gage that Peng had raised his fist and threatened M. Hu. (J. Hu Depo. at 34-35).

[4] Although Plaintiff attempts to use C. Peng's declaration to dispute the fact that Deputy Gage ever talked to C. Peng or Mr. Chi on the night of the incident, C. Peng's declaration cannot be used for that purpose. C. Peng's declaration does not claim that he and Mr. Chi never spoke with Deputy Gage or J. Hu; rather, C. Peng disputes the *substance* of the conversation. Thus, C, Peng's declaration does not dispute the fact that Deputy Gage was told by J. Hu, acting as a translator, that the two witnesses observed Peng grab the documents out of M. Hu's hand and purse. C. Peng's declaration only casts doubt as to J. Hu's honesty and/or translating ability.

Deputy Gage then arrested Peng for violation or Penal Code Section 211, Robbery. (SUF ¶ 25). For purposes of compiling FBI statistics, Deputy Gage classified this crime as a "strong-armed robbery" rather than an "armed robbery" because it was done by force, but not with the use of a weapon. (Id. ¶ 28).

On May 16, 2000, the District Attorney's Office determined that insufficient evidence existed to file criminal charges against Peng. (PSUF ¶ 41).

C. PLAINTIFF'S COMPLAINT AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On August 21, 2000, Plaintiff Peng filed a complaint against M. Hu, J. Hu and Deputy Gage, alleging two causes of action. The first is a Section 1983 action against all Defendants for allegedly violating Peng's Fourth Amendment right to be free from unreasonable searches and seizures, and Peng's right to equal protection of the laws under the Equal Protection Clause of the Fourteenth Amendment. (Compl. ¶ 26). The second cause of action is for false arrest and false imprisonment, asserted only against Defendants M. Hu and J. Hu. (Id. ¶ 31).

Defendant Deputy Gage's Motion for Summary Judgment is now before the Court. Defendant contends that Peng's arrest was lawful, as Deputy Gage had probable cause to believe that a crime had been committed and that Peng was the perpetrator. Defendant further asserts that he is entitled to qualified immunity for his warrantless arrest of Peng.

III.

ANALYSIS

A. STANDARD OF REVIEW FOR SUMMARY JUDGMENT MOTIONS

Summary Judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R, Cir. P. 56(c). Thus, when addressing a motion for summary judgment, this Court must decide whether there exist "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1988).

The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. Id. at 256. A party opposing a properly made and supported motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317,322, (1986).

B. QUALIFIED IMMUNITY IN FALSE ARREST CASES

Law enforcement officials are entitled to qualified immunity from suits under Section 1963, unless their conduct violates clearly established rights of which a reasonable officer would have known. See Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982); Jackson v. City of Bremerton, 268 F.3d 646, 650 (9th Cir. 2001). Under the Fourth Amendment, an arrest without a warrant is lawful if it was supported by probable cause to make the arrest. United States v. Buckner, 179 F.3d 834, 837 (9th Cir. 1999). Thus, a plaintiff may prevail on a 42 U.S.C. § 1983 claim for false arrest only if the arresting officer did not have probable cause to arrest him. Cabera v. City of Huntington Park, 159 F.3d 374, 380 (9th Cir. 1998).

"Probable cause exists when, under the totality of the cicumstances known to the arresting Officers, a prudent person would have concluded that there was a fair probability that [the defendant] had committed a crime." Buckner, 179 F.3d at 837 (alteration in original). In determining whether probable cause exists, "officers may not solely rely on the claim of a citizen witness that he was a victim of a crime, but must independently investigate the basis of the witness' knowledge or interview other witnesses." Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 925 (9th Cir. 2001).

As the Fourth Amendment right to be free from arrests lacking probable cause is clearly established, an arresting officer is entitled to qualified immunity only if a reasonable officer could have believed that probable cause existed to make the arrest. Mendocino Environmental Center v.

Mendocino County, 14 F.3d 457, 462 (9th Cir. 1994); Palmer v. Sanderson, 9 F.3d 1433, 1436 (9th Cir. 1993); ActUp!/Portland v. Bagley, 988 F.2d 868, 871 (9th Cir. 1993). Therefore, the relevant inquiry is whether, under the totality of the circumstances known to the officer at the time of arrest, the officer reasonably believed he had probable cause to arrest the suspect. Mendocino, 14 F.3d at 462.

Although this inquiry is fact specific, a district court must determine the qualified immunity issue on a motion for summary judgment if the facts are undisputed. Act Up!/Portland, 988 F.2d at 873. However, if genuine issues of material fact exist "relating to the historical facts of what the official knew or what he did, it is clear that these are questions of fact for the jury to determine." Sinaloa Lake Owners Ass'n v. City of Simi Valley, 70 F.3d 1095, 1099 (9th Cir. 1995); see also Pourny v. Maui Police Dep't, 127 F. Supp. 2d 1129, 1140-41 (D. Haw. 2000)("It is a question of fact *what* facts and circumstances were actually known to the officer; if a genuine dispute exists between the parties on this issue, the question must go to the fact finder.")(emphasis in original) (citing Act Up!/Portland, 988 F.2d at 873). Once the historical facts are established, however, "the determination whether those facts support an objective belief that probable cause or reasonable suspicion existed is ordinarily a question for the court." Act Up!/Portland, 988 F.2d at 873.

Deputy Gage contends that his warrantless arrest of Peng did not violate the Fourth Amendment because he had probable cause to believe Pang committed a felony --

robbery.[5] In determining whether Deputy Gage had probable cause to arrest Peng for robbery, the question is whether a reasonable officer, under the totality of the circumstances known to Deputy Gage at the time of the arrest, would have concluded that a fair probability existed that Peng committed a crime. Plaintiff contends that summary judgment is not proper here because factual issues exists regarding what facts Deputy Gage actually knew at the time of the arrest, Specifically, Plaintiff makes the following contentions:

- Peng never told Deputy Gage that he came to the house that night to discuss with his sister a dispute regarding land in Taiwan, and that his sister called the police because she gave him land documents to photocopy and had not yet returned them to her.

- Peng told Deputy Gage that he did not take anything from his sister.

- Deputy Gage never gave Peng a chance to explain his side of the story, all Peng told him was that this is a "family matter" dispute.

- Peng never told Deputy Gage that the documents were at his friend's house.

- M. Hu and J. Hu did not ask Deputy Gage to arrest Peng.

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[5] Under California law, robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Cal Penal Code § 211.

- C. Peng and Mr. Chi never told J. Hu or anyone else that Peng grabbed the documents out of M. Hu's hand or threatened her in anyway.

For purposes of this motion, the Court accepts the truth of these statements. Nevertheless, even if true, these facts do not defeat Deputy Gage's claim that the evidence ***known to him at the time*** justified the arrest. Deputy Gage was under no obligation to credit Peng's denials against other evidence that suggested the probability that a crime may have occurred. Moreover, the fact that the dispute arose in a family context, while having a significant bearing on the decision to proceed with a prosecution, does not negate the elements of the crime of robbery. Whether the Hu's asked Deputy Gage to arrest Peng is immaterial to the existence of probable cause, and whether C. Peng and Mr.Chi told J. Hu that Peng grabbed the documents does not change the fact that J. Hu acknowledges that he told Deputy Gage that they made such statements to him. Since the key question is Deputy Gage's state of mind, the only relevant issue is what J. Hu told Deputy Gage, and Plaintiff has not offered any competent evidence disputing the Information Deputy Gage learned from J. Hu.[6]

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[6] Plaintiffs argument that Deputy Gage acted unreasonably by relying on a third party interpreter is not persuasive. Deputy Gage was forced to respond to a scene where the victim and the percipient witnesses spoke only Mandarin Chinese. Police officers cannot be expected to know every language spoken by the citizens of California, nor can they afford to wait for certified interpreters to arrive at every possible crime scene. Thus, Deputy Gage acted objectively reasonable by relying on J. Hu as an interpreter.

Based on the facts known by Deputy Gage at the time of the arrest, the Court concludes that a reasonable officer could have believed that probable cause existed to arrest Peng for robbery. Deputy Gage did not rely solely on conclusory allegations made by M. Hu, the alleged victim of the robbery. Rather, M. Hu's allegations were specific, based on personal knowledge, and could support a reasonable police officer's conclusion that Peng used the threat of force to obtain the title documents from her. Furthermore, Deputy Gage did not arrest Peng immediately after talking to the victim. Instead, Deputy Gage attempted to verify M. Hu's allegations by talking to the witnesses at the scene. Although J. Hu's interpretation of the witnesses' statements may have been mistaken or tainted, Deputy Gage was able to verify a significant portion of M. Hu's allegations that Peng and M. Hu were involved in a dispute, that M. Hu had certain papers, and that Peng forcefully grabbed those out of her hand and from her purse against her will. Thus, the Court concludes that under the totality of the circumstances, Deputy Gage's belief that probable cause existed to arrest Peng for robbery was objectively reasonable.

For these reasons, the Court **GRANTS** Defendant Gage's Motion for Summary Judgment on Peng's false arrest claim.

C. EQUAL PROTECTION CLAIM

With respect to the Fourteenth Amendment claim, Plaintiff offers nothing more than conclusory allegations unsupported by any evidence showing an equal protection violation. The claim is contained in the following statement:

> [I]f plaintiff was arrested without probable cause and upon fabricated evidence then he was denied certain fundamental constitutional rights that clearly give rise to an equal protection claim.

In reality, Plaintiff has done nothing more than re-state the Fourth Amendment claim and assert that it also Constitutes an equal protection violation. This is insufficient. "To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir.1999). As Plaintiff has not presented any evidence to support an equal protection claim, Deputy Gage's motion is **GRANTED**.

IV.

CONCLUSION

For the reasons set forth above, the Court **GRANTS** Defendant Deputy Scott Gage's Motion for Summary Judgment.

IT IS SO ORDERED.

DATED: February 25, 2002

/s/
Judge Gary Allen Fees
United States District Court

Supreme Court, U.S.
FILED
JAN 2 6 2004
OFFICE OF THE CLERK

(2)

No. 03-768

In The
Supreme Court of the United States

HSIEN I. PENG,

Petitioner,

v.

MEI CHIN PENG HU; JONATHAN HU,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT TO QUESTION PRESENTED

In order to establish a right to recover under 42 U.S.C. §1983 against private defendants, does a Plaintiff need to prove a conspiracy between state official(s) and the private defendants? Does the mere making of the report to the police by a private person constitute a "state action" for purposes of the Fourteenth Amendment?

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STATEMENT OF THE CASE

Petitioner Hsien I. Peng filed his civil rights action under the Civil Rights Act, 42 U.S.C. §1983 against Los Angeles County Deputy Sheriff Scott Gage who is no longer in this proceeding, as well as his sister, Respondent Mei Chin Peng Hu, and his nephew, Respondent Jonathan Hu, alleging their violations of Peng's Fourth Amendment rights.

The District Court granted Deputy Sheriff's Summary Judgment Motion on the ground that under the totality of the circumstances, Deputy Gage's belief that probable cause existed to arrest Peng for robbery was objectively reasonable. The District Court reasoned that Deputy Gage did not rely solely on conclusory allegations made by M. Hu, the alleged victim of the robbery. Rather, M. Hu's allegations were specific, based on personal knowledge, and could support a reasonable police officer's conclusion that Peng used the threat of force to obtain the title documents from her. The District Court also held that whether Hus had asked Deputy Gage to arrest Peng is immaterial to the existence of probable cause. (Petition App. C at 42a)

Having granted the Deputy's Summary Judgment Motion, the District Court issued an Order to Show Cause for Plaintiff-Appellant to show the reason why the action under Section 1983 may proceed against the two remaining private/individual defendants. After its review of the parties' written responses to Court's Order to Show Cause, the District Court ordered that the case as against the individual defendants be dismissed on the ground that the individual defendants were not state actors for purposes of 42 U.S.C. §1983 because there was no concerted action

between them and Deputy Gage to have Petitioner arrested and, in the alternative, the individual defendants, M. Hu and J. Hu, did not have such control over Deputy Gage's conduct to be said to have proximately caused the alleged constitutional tort. (Petition App. C at 26a-30a).

Petitioner filed an appeal to the Ninth Circuit to the District Court's Order for Summary Judgment, dismissing Petitioner's claim against Deputy Sheriff Gage and the District Court's Order re: Subject Matter Jurisdiction dismissing Petitioner's claim against his sister and nephew.

The Ninth Circuit affirmed both orders of the District Court, holding that Deputy Gage had probable cause to arrest petitioner, and even if he did not have probable cause, Gage was entitled to qualified immunity; and that even though there were disputed facts as to whether Mei Hu and Jonathan Hu had lied to Gage in causing his arrest, there was no evidence that Gage knew that petitioner was innocent of robbery to determine concerted action to make Mei Hu and Jonathan Hu state actors for purposes of §1983.

The Ninth Circuit relied on this Court's decision in *Soldal v. Cook County*, 506 U.S. 56, 60 n.6, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992) which noted that "if the police condone activities by private parties that they know to be illegal, there exists sufficient evidence of conspiracy between the private parties and the officer to foreclose summary judgment." Lacking evidence of police's knowledge of Peng's alleged innocence, the Ninth Circuit, therefore, found no conspiracy between Deputy Gage and the two private parties. The Ninth Circuit further held that a single request to the police, without more, was not sufficient to

establish a claim against a private actor pursuant to §1983. (Petition App. B at 17a, 19a and 21a-22a).

Petitioner requested a rehearing and a rehearing en banc after the Ninth Circuit issued its opinion. The request for rehearing was denied, and Petitioner subsequently filed this Petition for Writ of Certiorari.

REASONS FOR DENYING REVIEW

I. THE DECISION OF THE NINTH CIRCUIT WAS CORRECT AND CONSISTENT WITH THIS COURT'S PRIOR DECISIONS.

A. THE NINTH CIRCUIT WAS CORRECT IN FINDING NO CONCERTED ACTION BETWEEN THE STATE OFFICIAL, DEPUTY GAGE, AND THE TWO PRIVATE PARTIES, MEI HU AND JONATHAN HU.

This Court has consistently held that the involvement of a state official in a conspiracy between state officials and private persons would provide the state action needed to show a direct violation of a victim's Fourteenth Amendment rights entitling her to relief under §1983 and that private persons involved in such a conspiracy are acting "under color" of law and can be liable under §1983. (*Adickes v. Kress & Co.*, 198 U.S. 144 (1970); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *United States v. Price*, 383 U.S. 787 (1966); *Dennis v. Sparks*, 449 U.S. 24 (1980))

This Court in *Adickes v. Kress & Co.*, 198 U.S. 144 (1970) held that the involvement of a state official in a conspiracy plainly provides the state action essential to

show a direct violation of the victim's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful and that a private party involved in such a conspiracy, even though not an official of the State, can be liable under 1983. This Court further held that "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents," (citing *United States v. Price*, 383 U.S. 787, 794 (1966).) Id., 398 U.S. at 153. This Court had placed the emphasis on the issue whether the private person and the policeman somehow reached an understanding to deny Miss Adickes service or to cause her subsequent arrest.

In *United States v. Price*, 383 U.S. 787 (1966), this court held that private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute [§1983]. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents. This Court noted that in *Price* the brutal joint adventure was made possible by state detention and calculated release of the prisoners by an officer of the State. This action, clearly attributable to the State, was part of the monstrous design described by the indictment. State officers participated in every phase of the alleged venture: the release from jail, the interception, assault and murder. It was a joint activity, from start to finish. Those who took advantage of participation by state officers in accomplishment of the foul purpose alleged must suffer the consequences of that

participation. In effect, if the allegations are true, they were participants in official lawlessness, acting in willful concert with state officers and hence under color of law. Id., 383 U.S. 787 at 795-796.

Hence, this Court has clearly set forth the rule that private persons must have been participants in official lawlessness and must have acted in willful concert with state officers to be held liable under §1983. And, the Ninth Circuit was correct in requiring a private party to be a willful participant in joint action with the State or its agents. (Petition App. B, at 21a.)

B. BOTH THE DISTRICT COURT AND THE NINTH CIRCUIT HAVE FOUND THAT THE STATE OFFICIAL, DEPUTY GAGE, HAD PROBABLE CAUSE TO ARREST PETITIONER OR IN THE ALTERNATIVE, HAD QUALIFIED IMMUNITY WHEN CONDUCTING THE ARREST. THEREFORE, THERE WAS NO "STATE ACTION" FOR PURPOSES OF FOURTEENTH AMENDMENT VIOLATION ON PART OF DEPUTY GAGE, AND THERE COULD NOT BE ANY CONSPIRACY BETWEEN RESPONDENTS, THE PRIVATE PARTIES, AND THE DEPUTY SHERIFF WHO DID NOTHING WRONG TO CONDUCT THE ARREST.

In *Dennis v. Sparks*, 449 U.S. 24 (1980), where it was alleged a Texas state court's judge had conspired with private parties to illegally issue an injunction which was subsequently dissolved by the appellate court, this Court held that the judge's immunity from damages liability for an official act that was allegedly the product of a corrupt

conspiracy involving bribery of the judge does not change the character of his action or that of his co-conspirators. Therefore, the action against the private parties accused of conspiring with the judge is not subject to dismissal. Id., 449 U.S. 24, 25.

This case is easily distinguished from the *Dennis* case in that the state official, Deputy Gage, was held by both the District Court and the Ninth Circuit not to have violated Petitioner's constitutionally protected rights and that both courts have ruled that there was no concerted action between Deputy Gage and the private parties, Mei Hu and Jonathan Hu. In fact, the District Court had found that Deputy Gage did not rely solely on conclusory allegations made by M. Hu, the alleged victim of the robbery. Rather, M. Hu's allegations were specific, based on personal knowledge, and could support a reasonable police officer's conclusion that Peng used the threat of force to obtain the title documents from her. The District Court also held that whether Hus had asked Deputy Gage to arrest Peng is immaterial to the existence of probable cause. (Petition App. C at 42a) In *Dennis*, this Court did not resolve the issue whether there actually existed any conspiracy between the judge and the private parties. This Court was called upon to decide the issue whether a 1983 action against the private parties can be maintained after the alleged co-conspirator judge had claimed immunity and was dismissed out of the case. This Court provided a positive answer to the question.

In this case, Petitioner has limited his Petition for Review to the Ninth Circuit's decision affirming the District Court's order to dismiss the private persons on the subject matter ground and framed his issue in the fashion showing that Petition admitted that there was no

conspiracy between the arresting officer and the private parties and that Petitioner is asking this Court to determine whether private parties by providing false statements to State Officials to cause the State Officials' independent arrest of Petitioner can be held liable under 42 U.S.C. §1983. Since there existed no conspiracy between Deputy Gage and Respondents, Mei Hu and Jonathan Hu, following the well-established rules by this Court, the private persons cannot be held to have acted "under color" of law and cannot be liable under §1983.

II. THIS COURT IN *LUGAR v. EDMONDSON OIL CO.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) HAS CLEARLY SET FORTH THE RULE FOR THE RELATIONSHIP BETWEEN §1983 REQUIREMENT OF "ACTION UNDER COLOR OF STATE LAW" AND THE FOURTEENTH AMENDMENT REQUIREMENT OF "STATE ACTION."

In *Lugar*, the Respondent creditors filed suit in Virginia state court on a debt owed by Petitioner, and sought prejudgment attachment of certain of Petitioner's property. Pursuant to Virginia law, respondents alleged, in an ex parte petition, a belief that petitioner was disposing of or might dispose of his property in order to defeat his creditors; acting upon that petition, a Clerk of the state court issued a writ of attachment, which was executed by the County Sheriff; a hearing on the propriety of the attachment was later conducted; and 34 days after the levy the trial judge dismissed the attachment for respondents' failure to establish the alleged statutory grounds for attachment. Petitioner then brought this action in Federal District Court under 1983, alleging that in attaching his

property respondents had acted jointly with the State to deprive him of his property without due process of law.

The District Court held that the alleged actions of the respondents did not constitute state action as required by the Fourteenth Amendment, and that the complaint therefore did not state a valid claim under 1983. The Court of Appeals affirmed, but on the basis that the complaint failed to allege conduct under color of state law for purposes of 1983 because there was neither usurpation or corruption of official power by a private litigant nor a surrender of judicial power to the private litigant in such a way that the independence of the enforcing officer was compromised to a significant degree. Id., 457 U.S. at 922.

A. THE "STATE-ACTION" AND THE "UNDER-COLOR-OF-STATE-LAW" ARE IDENTICAL IF THE 1983 ACTION IS BROUGHT AGAINST A STATE OFFICIAL. AS TO A 1983 ACTION AGAINST A PRIVATE PERSON, IF THE CHALLENGED CONDUCT OF PRIVATE PERSON CONSTITUTES STATE ACTION AS DELIMITED BY THIS COURT'S PRIOR DECISION, THEN THE CONDUCT OF THE PRIVATE PERSON WAS ALSO ACTION UNDER COLOR OF STATE LAW.

This Court noted that the "state-action" and the "under-color-of-state-law" requirements are obviously related and that in a 1983 action brought against a state official, the statutory requirement of action "under color of state law" and the "state action" requirement of the Fourteenth Amendment are identical. Id., 457 U.S. at 929. As to a 1983 action against a private person, this Court held that private use of the challenged state procedures

with the help of state officials constitutes state action for purposes of the Fourteenth Amendment. This Court also held that if the creditor-plaintiff violates the debtor-defendant's due process rights by seizing his property in accordance with statutory procedures, there is little or no reason to deny to the latter a cause of action under the federal statute, §1983, designed to provide judicial redress for just such constitutional violations. This Court further noted that to read the "under color of any statute" language of the Act in such a way as to impose a limit on those Fourteenth Amendment violations that may be redressed by the 1983 cause of action would be wholly inconsistent with the purpose of the Civil Rights Act of 1871, 17 Stat. 13, from which 1983 is derived. Id., 457 U.S. at 935. This Court, therefore, summarized the rule as follows: If the challenged conduct of respondents constitutes state action as delimited by the Court's prior decisions, then that conduct was also action under color of state law and will support a suit under 1983.

As to what constitutes state action, this Court emphasized that careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. The conduct allegedly causing the deprivation of a federal right, according to this Court, must be fairly attributable to the State. There is a two-part approach to this question of "fair attribution." First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. Second, the party charged with the deprivation must be a

person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them. Id., 457 U.S. 938.

This Court clarify the issues of *Lugar* by stating that the first question of the case is whether the claimed deprivation has resulted from the exercise of a right or privilege having its source in state authority. The second question is whether, under the facts of this case, respondents, who are private parties, may be appropriately characterized as "state actors." Id., 457 U.S. at 940. This Court stated that the resolution of the issue whether *Lugar*'s ultimate claim of unconstitutional deprivation was directed at the Virginia statute itself or only at its erroneous application to him is essential to the proper disposition of the case. This Court determined that Petitioner actually were challenging the state statute as procedurally defective under the Fourteenth Amendment and held that while private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a 1983 action, if the second element of the state-action requirement is met as well.

B. WHETHER THE CHALLENGED CONDUCT OF A PRIVATE PERSON CONSTITUTES A STATE ACTION IS DETERMINED BY PRIVATE PARTIES' JOINT PARTICIPATION WITH STATE OFFICIALS IN THE DEPRIVATION OF RIGHTS OF THE VICTIM.

To determine whether the second element of the state-action requirement is met, this Court went on to recite the well-established rules by this Court as follows:

> "We have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment. The rule in these cases is the same as that articulated in *Adickes v. S. H. Kress & Co., supra*, at 152, in the context of an equal protection deprivation"
>
> "'Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents,'" quoting *United States v. Price*, 383 U.S., at 794." Id., 457 U.S. 922 at 942.

In sum, a private person may be held liable under §1983 for his use of a procedurally defective State statute to deprive another person's Fourteenth Amendment rights, if the private person jointly participated with the state officials in the deprivation of the other's constitutionally protected rights.

This Court in *Lugar*, therefore, has clearly set forth the rule for the relationship between §1983 requirement of

"Action under Color of State Law" and the Fourteenth Amendment Requirement of "State Action" both in the context of a 1983 action against a state official and a 1983 action against a private person. There is no need for this Court to readdress the same issue.

Moreover, the instant case can be distinguished from *Lugar* in the following aspects: (1) In *Lugar*, the State statute invoked by the respondent creditors was procedurally defective and hence unconstitutional, whereas in the instant case Petitioner never challenged any California statute relied upon by the Deputy Gage to effectuate the arrest of Petitioner; (2) In *Lugar*, the state action was found in the enactment of the unconstitutional statute, in the instant case there was no illegal state action due to the fact that the District Court and the Ninth Circuit both ruled that Deputy Gage had probable cause to arrest Petitioner; (3) In *Lugar*, respondent did not misuse the state statute which was challenged as unconstitutional, whereas in the instant case Petitioner readdressed the issue in his Petition for Writ of Certiorari as whether by making the false statement to the arresting officer, Respondents Mei Hu and Jonathan Hu may be held liable under 42 U.S.C. §1983. This Court in *Lugar* has answered this particular question negatively when this Court held that private misuse of a state statute does not describe conduct that can be attributed to the State.

III. CONCLUSION

This Court in numerous prior decisions has already addressed the issue concerning when a private person can be deemed as a state actor and be held liable under 42 U.S.C. §1983. The Court also has adequately addressed

the issue concerning the relationship between the 1983 requirement of "action under color of state law" and the Fourteenth Amendment requirement of "state action" in the *Lugar* case. The Ninth Circuit did not err in characterizing this Court's prior case law in the instant case. There is, therefore, no need to readdress the issue. The Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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In the Supreme Court of the United States

HSIEN I. PENG,

Petitioner,

v.

MEI CHIN PENG HU; JONATHAN HU,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

The published opinion of the Ninth Circuit should not be allowed to stand, because it incorrectly holds that a private party who receives overt, significant assistance of state officials in effecting a false arrest of an individual can only be held liable under 42 U.S.C. § 1983 by necessarily requiring a further finding of a co-conspiracy between the State and the private party to deprive the individual of his or her constitutional rights.

Respondents' Brief in Opposition to the Petition for Writ of Certiorari and the Ninth Circuit Opinion demonstrates the confusion surrounding the proper standard of review. The Court should directly address the proper standard of review in the case of a false arrest as to what satisfies § 1983's "under color of state law" requirement to establish a right to recover against a private defendant.

REASONS FOR GRANTING THE WRIT

I. THE PROPER STANDARD OF REVIEW IN THE CASE OF A FALSE ARREST AS TO WHAT SATISFIES 42 U.S.C. § 1983'S "UNDER COLOR OF STATE LAW" REQUIREMENT TO ESTABLISH A RIGHT TO RECOVER AGAINST A PRIVATE DEFENDANT IS AN IMPORTANT QUESTION OF FEDERAL LAW.

Petitioner asks this Court to articulate and clarify 42 U.S.C. § 1983's "under color of state law" requirement to establish a right to recover against a private defendant in the case of a false arrest. The Court has never directly addressed the question presented in the Petition for Writ of Certiorari.

Accordingly, this is "an important question of federal law that has not been, but should be, settled by this *Court.*" Sup.Ct.R. 10(c).

The Respondents' Brief in Opposition to the Petition for Writ of Certiorari, as does the Ninth Circuit Opinion, mischaracterizes this Court's prior case law.

Respondents' reliance on Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) is misplaced. In Adickes, this *Court was presented* with a claim by the petitioner of an alleged violation by the respondent of her constitutional rights under the Equal Protection Clause of the Fourteenth Amendment actionable under 42 U.S.C. § 1983 by reason of racial discrimination.

Petitioner, a white woman, was denied access to a public library and service in the respondent's restaurant because she was in the company of her black students and was shortly therafter arrested after leaving the restaurant on the charge of vagrancy by a policeman who previously came into the restaurant and observed her in the company of her students. Id., 398 U.S. at 149, 90 S.Ct. at 1604.

In Adickes, the petitioner specifically alleged in her complaint that the violation of her equal protection rights was the result of a conspiracy between the State and the respondent who was a private defendant. Id., 398 U.S. at 149, 90 S.Ct. at 1604. This Court held that the allegation of such a conspiracy "**plainly** provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful." Id., 398 U.S. 152, 90 S.Ct. 1605 (internal citations omitted) (emphasis added). As the Court emphasized, the petitioner

would clearly be entitled to relief under § 1983 if she could establish that the respondent somehow reached an understanding with the police to deprive petitioner of her constitutional rights. Id., 398 U.S. at 152, 90 S.Ct. at 1605.

While a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983 for being jointly engaged in the prohibited action, the Court never suggested in Adickes that a conspiracy requirement was a necessary predicate in all cases of the "joint participation" test.

In Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), the Court held that a private litigant in a civil case may not use peremptory to exclude jurors on account of race. The Court held that "[a]lthough the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional restraints." Id., 500 U.S. at 618, 111 S.Ct. at 2082.

The analytical framework used by the Court in determining "state action" for purposes of finding a violation of the Equal Protection Clause by the private respondent Leesville Concrete Co., Inc., was the two-part inquiry set forth in Lugar v. Edmonson Oil Co., 457 U.S. 922, 939-942, 102 S.Ct. 2744, 2754-2756, 73 L.Ed.2d 482 (1982). Id., 500 U.S. at 618-622, 111 S.Ct. at 2082-2083. As in Lugar, the Court asked first whether the claimed constitutional, deprivation resulted from the exercise of a right or privilege having its source in state authority; and second, whether the private party charged with the deprivation could be described

in all fairness as a state actor. Id., 500 U.S. at 622, 111 S.Ct. at 2083.

In analyzing the second part of the part of the Lugar test to determine whether a particular action or course of conduct is governmental in character, the Court held in Edmonson that it is relevant to examine the following: (1) the extent to which the actor relies on governmental assistance and benefits[1]; (2) whether the actor is performing a traditional governmental function; and (3) whether the injury caused is aggravated in a unique way by the incidents of government authority[2].

There can be no question that the first part of the Lugar inquiry is satisfied in this case. Respondents' report and request for assistance from law enforcement leading to petitioner's arrest has no significance outside of a legal framework of governmental power and authority. The Ninth Circuit recognized this fact when it held that "[c]learly, the arrest [of petitioner] was a state action." (App. B at 21a) .

Respondents' actions in this case also satisfy at least two of the three relevant factors cited in Edmonson in analyzing the second part of the Lugar test. Respondents' report to law enforcement for assistance made extensive use of state procedures with "the overt, significant assistance of state officials." Id., 500 U.S. at 622, 111 S.Ct. at 2084. Clearly without law enforcement's overt and significant assistance, a

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[1] Citing Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) and Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961) .

[2] Citing Shelly v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948).

citizen's report of this sort simply could not exist. Moreso, petitioner's ultimate arrest, the source of the constitutional injury, was uniquely satisfied by the incidents of governmental authority. This case is not about a citizen's arrest but an arrest directly effected by law enforcement upon the alleged false information provided by respondents.

What is significant in this case as it was in Edmonson in finding "state action" is that private individuals invoked the power and instrumentalities of the State within a state sanctioned legal framework not on whether the respondents reached an understanding with law enforcement to deprive petitioner of his constitutional rights.

As noted in the Petition for Writ of Certiorari, the fact-bound inquiry required in finding respondents' actions liable under § 1983 should not focus on the issue of a co-conspiracy but whether respondents' alleged false statements to Deputy Gage caused petitioner to be deprived of his constitutional rights. See Kilbourn v. Thompson, 103 U.S. 168, 200, 26 L.Ed. 377, 13 Otto 168 (1880) (holding that legislators directing an arrest are as responsible as those who effected the arrest); Malley v. Briggs, 475 U.S. 335, 344 n. 7, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (holding that an individual will be "responsible for the natural consequences of his actions.").

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Ninth Circuit judgment be reversed.

Dated: February 13, 2004

Respectfully submitted,

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